



SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA-2010-0060]

RIN 0960-AH26

Expedited Vocational Assessment Under the Sequential Evaluation Process

AGENCY: Social Security Administration.

ACTION: Final Rules.

SUMMARY: We are revising our rules to give adjudicators the discretion to proceed to the fifth step of the sequential evaluation process for assessing disability when we have insufficient information about a claimant's past relevant work history to make the findings required for step 4. If an adjudicator finds at step 5 that a claimant may be unable to adjust to other work existing in the national economy, the adjudicator will return to the fourth step to develop the claimant's work history and make a finding about whether the claimant can perform his or her past relevant work. We expect that this new expedited process will not disadvantage any claimant or change the ultimate conclusion about whether a claimant is disabled, but it will promote administrative efficiency and help us make more timely disability determinations and decisions.

DATES: These rules are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Janet Truhe, Office of Disability Programs, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235-6401, (410) 966-7203. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213, or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION:

Background

We published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on September 13, 2011.¹ In the NPRM, we proposed to give adjudicators the discretion to proceed to the fifth step of the sequential evaluation process for assessing disability when we have insufficient information about a claimant's past relevant work history to make the findings required for step 4. If an adjudicator finds at step 5 that a claimant may be unable to adjust to other work existing in the national economy, the adjudicator will return to the fourth step to develop the claimant's work history and make a finding about whether the claimant can perform his or her past relevant work. The expedited process does not affect our responsibility under the Social Security Act (Act) and our current regulations to make every reasonable effort to develop claimants' medical evidence.² The preamble to the NPRM provides a full explanation of the background of this expedited process. You can view the preamble to the NPRM by visiting www.regulations.gov and

¹ 76 FR 56357.

² See sections 223(d)(5)(B) and 1614(a)(3)(H) of the Act and 20 CFR 404.1512(d) and 416.912(d).

searching for document “SSA-2010-0060-0001.”

Public Comments

We provided 60 days for the public to comment on the NPRM. We received three comment letters. They came from a member of the disability advocacy community, a regional disability advocacy group, and a national group of Social Security claimants' representatives. You can view the comments by visiting www.regulations.gov and searching for “SSA-2010-0060.” After carefully considering the comments, we are adopting our proposed revisions, with a few minor changes described below, in these final rules.

Because of their length, we have condensed, summarized, and paraphrased the comments and responded to the significant issues raised by the commenters that were within the scope of these rules.

Comment: One commenter expressed concern that adjudicators may incorrectly deny claims if they do not fully develop claimants' past work histories and consider the special medical-vocational profiles.³ To ensure that adjudicators properly consider the special profiles, the commenter recommended that we require adjudicators who do not make findings at step 4 to state that they considered the potential application of the special profiles before they deny claims at step 5.

³ See 20 CFR 404.1562 and 416.962, Social Security Ruling 82-63, and POMS DI 25010.001, available at <http://policy.net.ba.ssa.gov/poms.nsf/lrx/0425010001>.

Response: We agree with the commenter that adjudicators who do not make findings at step 4 using the expedited process must consider the potential application of the special medical-vocational profiles before they deny claims at step 5. To remind our adjudicators to consider the special profiles in this situation, we are including a reference to section 404.1562⁴ in final sections 404.1520(h) and 404.1594(f)(9) and a reference to section 416.962⁵ in final sections 416.920(h) and 416.994(b)(5)(viii). We are also including a reference to section 404.1562 in final section 404.1545(a)(5)(ii) to be consistent with the reference to section 416.962 we proposed and are adopting in final section 416.945(a)(5)(ii).

However, we are not adopting the suggestion to require adjudicators to state that they considered medical-vocational profiles in this situation because we can address the commenter's concern in ways that we believe will be more effective.

First, we currently have an electronic claims analysis tool in widespread use at the initial level of our administrative review process that reminds adjudicators to consider these profiles before they evaluate claims at step 5. We will insert a similar reminder in this tool so that adjudicators will consider special profiles before determining whether to proceed to step 5 using the expedited process. As we indicated in the NPRM, if adjudicators use the expedited process, they will still consider whether claimants may be disabled based on the special medical-vocational profiles, the Medical-Vocational

⁴ Medical-vocational profiles showing an inability to make an adjustment to other work.

⁵ Id.

Guidelines (Guidelines),⁶ or an inability to meet the mental demands of unskilled work.⁷

We also explained that "[i]f any of these rules would indicate that the claimant may be disabled or if the adjudicator has any doubt whether the claimant can perform other work existing in significant numbers in the economy, the adjudicator must return to step 4 to further develop the claimant's vocational information and determine whether the claimant can perform his or her past relevant work."⁸ If there is insufficient evidence about a claimant's past relevant work in the record to determine whether a special medical-vocational profile applies, the adjudicator must return to step 4 to further develop the vocational evidence because a special medical-vocational profile may apply.

Second, we plan to conduct training on these final rules for adjudicators at all levels of the disability determination process regarding use of the new expedited process. We will also monitor the use of the expedited process during quality reviews to ensure that we apply the process correctly.

Comment: One commenter doubted whether we could deny claims at step 5 using the expedited process because a step 5 analysis must include consideration of claimants' past work histories. Another commenter stated we should always develop a complete past work history because evidence of past work can influence our finding at step 5 and can inform our assessment of the claimant's residual functional capacity (RFC).⁹

⁶ See 20 CFR 404.1569 and 416.969.

⁷ See 76 FR at 56359.

⁸ Id. (emphasis added).

⁹ See 20 CFR 404.1545 and 416.945. An RFC assessment is a finding about the most a claimant can still do despite his or her physical and mental limitations.

Response: We disagree with these comments. There are a number of situations in which it would be appropriate to deny a claim without considering a claimant's past work history. For example, if a claimant is 44 years old with a high school education and has the RFC to perform a full range of sedentary work, Rules 201.27, 201.28, and 201.29 of the Medical-Vocational Guidelines (Guidelines) direct that this claimant be found not disabled, regardless of the skill level of his or her past relevant work or the transferability of those skills.¹⁰ As we explained in the NPRM, adjudicators will only find that a claimant is not disabled without returning to step 4 when they can find at step 5 that a claimant is not disabled "based solely on age, education, and RFC, regardless of the claimant's skill level and transferability of those skills."¹¹

We also disagree with the comment that we need evidence of past work history to determine a claimant's RFC. As our current rules make clear, we determine a claimant's RFC before we go to step 4,¹² and we do not assess RFC in the context of a claimant's past work history. Rather, we determine a claimant's RFC based on his or her ability to meet the "physical, mental, sensory, and other requirements of work"¹³ on a "regular and continuous basis."¹⁴ For example, the physical demands of work include activities such as sitting, standing, and walking.¹⁵ We do not assess RFC in the context of a claimant's past work history; therefore, we can use the proposed expedited process regardless of past work history development.

¹⁰ See Appendix 2 to Subpart P of Part 404--Medical-Vocational Guidelines. In this example, none of the special profiles would potentially apply, and we assume that the claimant can meet the mental demands of unskilled work.

¹¹ 76 FR at 56359 (emphasis added).

¹² See 20 CFR 404.1520(a)(4) and 416.920(a)(4).

¹³ 20 CFR 404.1545(a)(4) and 416.945(a)(4).

¹⁴ 20 CFR 404.1545(b) and (c) and 416.945(b) and (c).

¹⁵ See 20 CFR 404.1545(b) and 416.945(b).

Comment: One commenter questioned our view that the expedited process would not disadvantage any claimant¹⁶ and expressed several concerns. The commenter believed that adjudicators would have too much discretion to decide when to use the expedited process because we did not explain what we mean by "insufficient" evidence to make a finding at step 4. The commenter said that by not requiring our adjudicators to make even a "reasonable effort" to obtain additional evidence of past work history, we diminish their duty to develop the record, even if evidence is readily available. The commenter also said that if we adopted the expedited process we would adjudicate claims using different procedures and would incorrectly deny some claims without fully assessing some claimants' abilities to perform their past relevant work. The commenter recognized that making the correct decision "as early in the process as possible is the key to a fair process," but said that the expedited process might lead us to deny claims incorrectly due to insufficient development of past work.

Response: We disagree with these comments. First, in response to the commenter's concern about the definition of "insufficient," we explained in the NPRM that we would consider evidence to be insufficient when a claimant does not provide us with enough information about each of his or her jobs within the relevant 15-year period on Form SSA-3368, Disability Report-Adult, (or the Internet version of this form)¹⁷ and, when necessary, Form SSA-3369, Work History Report,¹⁸ for us to make a finding at step

¹⁶ See 76 FR at 56357.

¹⁷ Currently available at <https://secure.ssa.gov/apps6z/radr/radr-fi>.

¹⁸ Currently available at <http://www.socialsecurity.gov/online/ssa-3369.pdf>.

4.¹⁹ Our adjudicators are familiar with the concept of “insufficient evidence” in this context, and we are confident that they understand reference to “insufficient evidence” of a claimant’s ability to do his or her past work. We also have not revised these rules to require adjudicators to make a reasonable effort to collect additional work history before going to step 5 in all cases. Imposing such a requirement would delay adjudication in those cases in which the claimant’s past relevant work history has no effect on the ultimate finding of disability.

Although use of the expedited process may change whether we deny a claim at step 5 versus step 4, we expect that it will not change the ultimate determination of whether the claimant is disabled. We will only deny a claim at step 5 using the expedited process if the claimant’s age, education, and RFC indicate that he or she is not disabled regardless of what an inquiry into past relevant work would reveal. As we noted in the NPRM, our experience using a similar expedient in the ten "prototype" States supports the conclusion that the expedited process does not change our ultimate decision as to whether or not a claimant is disabled.²⁰

OTHER CHANGES

We are correcting a cross-reference in §§404.1527 and 416.927 to reflect renumbering changes in a final rule published on February 23, 2012 at 77 FR 10651.

¹⁹ 76 FR at 56358.

²⁰ 76 FR at 56359.

REGULATORY PROCEDURES

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Thus, OMB reviewed them.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities because they only affect individuals. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

These final rules do not create any new or affect any existing collections; therefore, they do not require OMB approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security--Disability Insurance; 96.002, Social Security--Retirement Insurance; 96.004, Social Security--Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Michael J. Astrue,
Commissioner of Social Security.

For the reasons set out in the preamble, we are amending title 20 of the Code of Federal Regulations part 404 subpart P and part 416 subpart I as set forth below:

PART 404— FEDERAL OLD AGE, SURVIVORS AND DISABILITY INSURANCE
(1950-)

Subpart P—[Amended]

1. The authority citation for subpart P of part 404 is revised to read as follows:

Authority: Secs. 202, 205(a)-(b) and (d)-(h), 216(i), 221(a), (i), and (j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)-(b) and (d)-(h), 416(i), 421(a), (i), and (j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104-193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108-203, 118 Stat. 509 (42 U.S.C. 902 note).

2. Amend §404.1505 by revising the sixth sentence of paragraph (a) to read as follows:

§404.1505 Basic definition of disability.

(a) * * * If we find that you cannot do your past relevant work, we will use the same residual functional capacity assessment and your vocational factors of age, education, and work experience to determine if you can do other work. (See §404.1520(h) for an exception to this rule.) * * *

* * * * *

3. Amend §404.1520 by adding a new second sentence to paragraph (a)(4), by revising the last sentence of paragraph (a)(4)(iv), the last sentence of paragraph (a)(4)(v), the second sentence of paragraph (f), and by adding a new paragraph (h), to read as follows:

§404.1520 Evaluation of disability in general.

(a) * * *

(4) * * * See paragraph (h) of this section for an exception to this rule. * * *

(iv) * * * See paragraphs (f) and (h) of this section and §404.1560(b).

(v) * * * See paragraphs (g) and (h) of this section and §404.1560(c).

* * * * *

(f) * * * See paragraph (h) of this section and §404.1560(b). * * *

* * * * *

(h) Expedited process. If we do not find you disabled at the third step, and we do not have sufficient evidence about your past relevant work to make a finding at the fourth step, we may proceed to the fifth step of the sequential evaluation process. If we find that you can adjust to other work based solely on your age, education, and the same residual functional capacity assessment we made under paragraph (e) of this section, we will find that you are not disabled and will not make a finding about whether you can do your past relevant work at the fourth step. If we find that you may be unable to adjust to other work or if §404.1562 may apply, we will assess your claim at the fourth step and make a

finding about whether you can perform your past relevant work. See paragraph (g) of this section and §404.1560(c).

4. In §404.1527(e)(1)(ii), remove “paragraph (f)(1)(i) of this section” and add in its place “paragraph (e)(1)(i) of this section”.

5. Amend §404.1545 by revising the first sentence of paragraph (a)(5)(ii) to read as follows:

§404.1545 Your residual functional capacity.

(a) * * *

(5) * * *

(ii) If we find that you cannot do your past relevant work, you do not have any past relevant work, or if we use the procedures in §404.1520(h) and §404.1562 does not apply, we will use the same assessment of your residual functional capacity at step five of the sequential evaluation process to decide if you can adjust to any other work that exists in the national economy. * * *

* * * * *

6. Amend §404.1560 by adding a second sentence to paragraph (b) and revising the first two sentences of paragraph (c)(1) to read as follows:

§404.1560 When we will consider your vocational background.

* * * * *

(b) * * * See §404.1520(h) for an exception to this rule.

* * * * *

(c) Other work. (1) If we find that your residual functional capacity does not enable you to do any of your past relevant work or if we use the procedures in §404.1520(h), we will use the same residual functional capacity assessment when we decide if you can adjust to any other work. We will look at your ability to adjust to other work by considering your residual functional capacity and the vocational factors of age, education, and work experience, as appropriate in your case. (See §404.1520(h) for an exception to this rule.) * * *

* * * * *

7. Amend §404.1565 by revising the second sentence of paragraph (b) to read as follows:

§404.1565 Your work experience as a vocational factor.

* * * * *

(b) * * * If you cannot give us all of the information we need, we may try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker. * * *

8. Amend §404.1569 by revising the third sentence to read as follows:

§404.1569 Listing of Medical-Vocational Guidelines in appendix 2.

* * * We apply these rules in cases where a person is not doing substantial gainful activity and is prevented by a severe medically determinable impairment from doing vocationally relevant past work. (See §404.1520(h) for an exception to this rule.) * * *

9. Amend §404.1594 by revising paragraph (f)(8) and adding a new paragraph (f)(9) to read as follows:

§404.1594 How we will determine whether your disability continues or ends.

* * * * *

(f) * * *

(8) If you are not able to do work you have done in the past, we will consider whether you can do other work given the residual functional capacity assessment made under paragraph (f)(7) of this section and your age, education, and past work experience (see paragraph (f)(9) of this section for an exception to this rule). If you can, we will find that your disability has ended. If you cannot, we will find that your disability continues.

(9) We may proceed to the final step, described in paragraph (f)(8) of this section, if the evidence in your file about your past relevant work is not sufficient for us to make a finding under paragraph (f)(7) of this section about whether you can perform your past relevant work. If we find that you can adjust to other work based solely on your age, education, and residual functional capacity, we will find that you are no longer disabled, and we will not make a finding about whether you can do your past relevant work under paragraph (f)(7) of this section. If we find that you may be unable to adjust to other work or if §404.1562 may apply, we will assess your claim under paragraph (f)(7) of this section and make a finding about whether you can perform your past relevant work.

* * * * *

PART 416— SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND,
AND DISABLED

Subpart I—[Amended]

10. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383b); secs. 4(c) and 5, 6(c)-(e), 14(a), and 15, Pub. L. 98-460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

11. Amend §416.905 by revising the last sentence of paragraph (a) to read as follows:

§416.905 Basic definition of disability for adults.

(a) * * * If we find that you cannot do your past relevant work, we will use the same residual functional capacity assessment and your vocational factors of age, education, and work experience to determine if you can do other work. (See §416.920(h) for an exception to this rule.)

* * * * *

12. Amend §416.920 by adding a new second sentence to paragraph (a)(4), by revising the last sentence of paragraph (a)(4)(iv), the last sentence of paragraph (a)(4)(v), the second sentence of paragraph (f), and by adding a new paragraph (h), to read as follows:

§416.920 Evaluation of disability of adults, in general.

(a) * * *

(4) * * * See paragraph (h) of this section for an exception to this rule. * * *

(iv) * * * See paragraphs (f) and (h) of this section and §416.960(b).

(v) * * * See paragraphs (g) and (h) of this section and §416.960(c).

* * * * *

(f) * * * See paragraph (h) of this section and §416.960(b). * * *

* * * * *

(h) Expedited process. If we do not find you disabled at the third step, and we do not have sufficient evidence about your past relevant work to make a finding at the fourth step, we may proceed to the fifth step of the sequential evaluation process. If we find that you can adjust to other work based solely on your age, education, and the same residual functional capacity assessment we made under paragraph (e) of this section, we will find that you are not disabled and will not make a finding about whether you can do your past relevant work at the fourth step. If we find that you may be unable to adjust to other work or if §416.962 may apply, we will assess your claim at the fourth step and make a finding

about whether you can perform your past relevant work. See paragraph (g) of this section and §416.960(c).

13. In §416.927(e)(1)(ii), remove “paragraph (f)(1)(i) of this section” and add in its place “paragraph (e)(1)(i) of this section”.

14. Amend §416.945 by revising the first sentence of paragraph (a)(5)(ii) to read as follows:

§416.945 Your residual functional capacity.

(a) * * *

(5) * * *

(ii) If we find that you cannot do your past relevant work, you do not have any past relevant work, or if we use the procedures in §416.920(h) and §416.962 does not apply, we will use the same assessment of your residual functional capacity at step five of the sequential evaluation process to decide if you can adjust to any other work that exists in the national economy.

* * * * *

15. Amend §416.960 by adding a second sentence to paragraph (b) and revising the first two sentences of paragraph (c)(1) to read as follows:

§416.960 When we will consider your vocational background.

* * * * *

(b) * * * See §416.920(h) for an exception to this rule.

* * * * *

(c) Other work. (1) If we find that your residual functional capacity does not enable you to do any of your past relevant work or if we use the procedures in §416.920(h), we will use the same residual functional capacity assessment when we decide if you can adjust to any other work. We will look at your ability to adjust to other work by considering your residual functional capacity and the vocational factors of age, education, and work experience, as appropriate in your case. (See §416.920(h) for an exception to this rule.) * * *

* * * * *

16. Amend §416.965 by revising the second sentence of paragraph (b) to read as follows:

§416.965 Your work experience as a vocational factor.

* * * * *

(b) * * * If you cannot give us all of the information we need, we may try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker. * * *

17. Amend §416.969 by revising the third sentence to read as follows:

§416.969 Listing of Medical-Vocational Guidelines in appendix 2 of subpart P of part 404 of this chapter.

* * * We apply these rules in cases where a person is not doing substantial gainful activity and is prevented by a severe medically determinable impairment from doing vocationally relevant past work. (See §416.920(h) for an exception to this rule.) * * *

18. Amend §416.987 by revising the first sentence of paragraph (b) to read as follows:

§416.987 Disability redeterminations for individuals who attain age 18.

* * * * *

(b) * * * When we redetermine your eligibility, we will use the rules for adults (individuals age 18 or older) who file new applications explained in §416.920(c) through (h). * * *

* * * * *

19. Amend §416.994 by revising paragraph (b)(5)(vii) and adding a new paragraph (b)(5)(viii) to read as follows:

§416.994 How we will determine whether your disability continues or ends, disabled adults.

* * * * *

(b) * * *

(5) * * *

(vii) Step 7. If you are not able to do work you have done in the past, we will consider whether you can do other work given the residual functional capacity assessment made under paragraph (b)(5)(vi) of this section and your age, education, and past work experience (see paragraph (b)(5)(viii) of this section for an exception to this rule). If you can, we will find that your disability has ended. If you cannot, we will find that your disability continues.

(viii) Step 8. We may proceed to the final step, described in paragraph (b)(5)(vii) of this section, if the evidence in your file about your past relevant work is not sufficient for us to make a finding under paragraph (b)(5)(vi) of this section about whether you can perform your past relevant work. If we find that you can adjust to other work based solely on your age, education, and residual functional capacity, we will find that you are no longer disabled, and we will not make a finding about whether you can do your past relevant work under paragraph (b)(5)(vi) of this section. If we find that you may be unable to adjust to other work or if §416.962 may apply, we will assess your claim under paragraph (b)(5)(vi) of this section and make a finding about whether you can perform your past relevant work.

* * * * *